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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946

No. 613

IN THE MATTER OF

GRANADA APARTMENTS, INC., A CORPORATION,
Debtor.

GRANADA APARTMENTS HOTEL CORPORATION,
A CORPORATION,
Petitioner,

vs.

CITY NATIONAL BANK AND TRUST COMPANY
OF CHICAGO, INDIVIDUALLY AND AS
SUCCESSOR TRUSTEE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

Granada Apartments Hotel Corporation prays the issuance of a writ of certiorari to review the judgment of the Circuit Court of Appeals for the 7th Circuit entered June 6, 1946, as modified July 17, 1946. Said judgment (a) overruled petitioner's motion to dismiss the appeal

in that court because not prosecuted within the time and in the manner provided by section 250 of the Bankruptcy Act, governing appeals from orders allowing or disallowing fees and expenses in corporate reorganization proceedings; (b) reversed the order of the District Court of the United States for the Northern District of Illinois, Eastern Division, denying allowance to respondent of fees for its attorneys and expenses in prior litigation in this case; and (c) directed the entry of a judgment by the district court, without further hearing, for approximately $20,500 on account of said fees and expenses.

OPINION BELOW.

The opinion of the Circuit Court of Appeals for the 7th Circuit is reported at 155 F. 2d 882. Prior litigation in this case is reported in 111 F. 2d 834; reversed, 312 U.S. 262.

STATEMENT OF THE MATTER INVOLVED.

This case arises in corporate reorganization proceedings commenced under Section 77-B of the Bankruptcy Act and concluded under chapter 10 of the Bankruptcy Act.

City National Bank and Trust Company of Chicago, the respondent, was successor trustee under a trust deed securing the first mortgage bonds of the debtor.

A plan of reorganization of the debtor was confirmed by the district court July 14, 1937 and the property of the debtor was turned over to Granada Apartments Hotel Corporation, petitioner, by order of October 22, 1937, subject to the then pending claims for fees and expenses. **(R. 98)**

In September 1937 there were pending before the district court in this case:

(1) Petitions for fees and expenses of City National, the bondholders committee, and their counsel, in the aggregate amount of approximately $41,000. (R. 232)

(2) The report and account of City National, as trustee formerly in possession of the property of the debtor. (R. 232)

(3) Objections of the trustee in bankruptcy to the foregoing petitions for fees and expenses and to the report and account. He set up various breaches of trust and mismanagement by City National and pointed out that these claimants had acted in dual and conflicting capacities. (R. 28)

(4) A counterclaim by the trustee in bankruptcy against City National based upon the same allegations and contained in the same document as were the objections to the fees and expenses claimed. (R. 28)

The fee and expense claims were referred to Referee Chindblom to hear and report the evidence thereon without conclusions of law or fact. Additional evidence was heard directly by the district court. The records of the two hearings were consolidated by order of October 21, 1937.*

All pending matters were disposed of by one order of district court on May 2, 1939. The trustee's charges against City National were sustained, but recovery on the trustee's counterclaim was denied except as recoupment against the fee and expense claims. (R. 129)

City National then appealed from the order denying

* Record in Nos. 281 and 282, p. 712.

to it, its counsel, and the bondholders committee fees and expenses (Nos. 7060 and 6986 in the circuit court of appeals). Thereafter, the bankruptcy trustee appealed from the same order on the ground that a money judgment should have been entered against City National (No. 7061 in the circuit court of appeals). There was one record. The cases were consolidated for argument and disposed of in one opinion, *City National Bank and Trust Company, et al* v. *Woods,* 111 F. 2d 834. The circuit court of appeals reversed the judgment of the district court.

Two petitions for certiorari were filed by the bankruptcy trustee. No. 310 sought reversal of the order denying the bankruptcy trustee a money judgment against City National. Certiorari was denied October 14, 1940, *Woods* v. *City National, et al,* 311 U.S. 676. Nos. 281-282 sought reversal of the action of the circuit court of appeals sustaining the fee and expense claims. Certiorari was granted October 14, 1940, *Woods* v. *City National Bank and Trust Company, et al.,* 311 U.S. 629. February 3, 1941, the judgment reviewed in Nos. 281-282 was reversed, *Woods* v. *City National Bank and Trust Company of Chicago,* 312 U.S. 262.

This court there denied to City National Bank, the bondholders committee dominated by City National, and the counsel for both of the foregoing, all fees and expenses other than expenses *which directly benefited the estate.*

The requested fees and expenses were denied because applicants had acted in dual and conflicting capacities. Thereafter, City National filed in the district court a petition for reimbursement for alleged expenses of successfully defending itself against unjustified charges of breach of trust brought against it by the trustee in bankruptcy. (R. 143)

After hearing evidence, the special master to whom City National's petition was referred by the district court, found:

(1) City National was not engaged exclusively in the defense of a claim against it (the alleged expense of which it now claims), but on the contrary was engaged in the prosecution of its several claims for fees and expenses, to which the trustee in bankruptcy had filed objections, and that the expenses now sought to be recovered were incurred in the unsuccessful prosecution of its claims. (R. 238)

(2) City National, having been denied compensation and reimbursement for expenses except those which directly benefited the estate, is now barred from reimbursement for the expense of its incidental defense against the claims of the trustee in bankruptcy. (R. 238)

(3) Should the foregoing conclusions be reversed, the master said, the items claimed by the bank, with one exception, "were incurred by the bank in the objections and counterclaim of the trustee and are proper items of allowance * * *", and that the requested attorney fee is reasonable. The master concluded, however, that since the security holders received a return through the reorganization of only 35 per cent of their investment, the City National should be limited to 35 per cent of the requested allowance. (R. 239)

The master recommended that the petition be denied. The district court confirmed the master's report of October 4, 1944. On November 6, 1944, the district court entered an order vacating its October 4, 1944 order and again

confirming the master's report and dismissing the petition *nunc pro tunc* as of October 4, 1944. (R. 245)

Notice of appeal was filed November 13, 1944 and the record was filed in the circuit court of appeals February 1, 1945, nearly four months after entry of the order appealed from. No application for leave to appeal was made to the circuit court of appeals.

Petitioner moved to dismiss the appeal because the order appealed from denied respondent reimbursement for expenses and was hence governed by section 250 of the Bankruptcy Act (11 U.S.C. 650). Petitioner contended that in the absence of presentation to the circuit court of appeals within forty days of the order appealed from, the circuit court of appeals had no jurisdiction of the matter. The motion to dismiss was denied by the circuit court of appeals, which thereupon reversed the trial court and ordered entry of judgment in the trial court for the amount prayed in the petition.

JURISDICTIONAL STATEMENT.

(a) The statutory provision believed to sustain the jurisdiction is found in section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C.A. 347).

(b) The judgment sought to be reviewed was entered June 6, 1946, and petitioner's petition for rehearing denied July 17, 1946. The date upon which this application for certiorari as presented is October 14, 1946.

QUESTIONS PRESENTED.

1. Is not the petition in this case one for reimbursement of expenses under section 250 of the Bankruptcy Act, and therefore should not the appeal herein have been

dismissed because neither (a) a petition for leave to appeal was filed in the Circuit Court of Appeals for the Seventh Circuit, nor (b) was the matter otherwise brought before the Circuit Court of Appeals for the Seventh Circuit within forty days from the entry of the order denying the petition?

2. Is not the present claim for reimbursement for expenses barred by the prior holding of this court, denying recovery to respondent except for expenses shown to have benefited the estate?

3. Should a mortgage trustee be reimbursed for alleged expenses incurred by it in defending itself against charges of fraud and mismanagement asserted by a *bankruptcy trustee*, where the expenses of defense were incurred in the same litigation in which it was asserting claims for compensation which were denied because of its breach of trust and there was no showing that the bankruptcy trustee's assertion of a counterclaim caused the mortgage trustee any greater expense than was involved in the mortgage trustee prosecuting its own claims.

4. Should the master's finding of fact, approved by the trial court, that City National's expenses for which reimbursement was sought were incurred not in defense but in prosecuting City National's own claim for fees and expenses, be reversed on appeal, where the record sustains such finding?

5. Should the mandate of the circuit court of appeals have directed the trial court to enter judgment for the full amount sought where there had been no hearing except before the master, who limited recovery to 35 per cent of the amount sought, hence eliminating the necessity of determining whether the proof sustained recovery on individual items and where the trial court adopted the principal finding of the master that no recovery was justified and had no occasion to pass upon his alternative finding.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. Question No. 1 has been decided by the circuit court of appeals in direct conflict with the decision of this court in *Dickinson Industrial Site* v. *Cowan*, 309 U.S. 382, and involves a misconception of the rule laid down by this court in *Reconstruction Finance Corporation* v. *Prudence Securities Advisory Group*, 311 U.S. 579.

2. Question No. 2 has been decided by the circuit court of appeals in direct conflict with the decision of this court in *Woods* v. *City National Bank and Trust Company of Chicago*, 312 U.S. 262.

3. Question No. 3 is an important question of federal law decided by the circuit court of appeals, which has not been but should be settled by this court.

4. In ignoring the primary finding of fact by the master which was approved by the trial court (question No. 4), in ignoring the prior adjudication of this court in this matter (question No. 2), and in directing the entry of a judgment without affording petitioner an adequate hearing (question No. 5), the circuit court of appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

SUMMARY OF ARGUMENT.

I.

The appeal should have been dismissed by the circuit court of appeals. The order of the trial court dismissed respondent's petition for reimbursement of expenses, hence the appeal could only be prosecuted by leave of the circuit court of appeals presented within forty days from the entry of the order appealed from.

The circuit court of appeals in allowing the appeal, although nothing was before that court until almost four months after the entry of the order appealed from, misconstrued the holding of this court in *Reconstruction Finance Corporation* v. *Prudence Securities Advisory Group*, 311 U.S. 579.

II.

This court in *Woods* v. *City National Bank and Trust Company of Chicago*, 312 U.S. 262, held that City National, the respondent, was only entitled to recover in these proceedings expenses which directly benefited the estate. No claim is made that the expenses here sought to be recovered benefited the estate, hence no recovery is justified and the decision below permitting such recovery is in direct conflict with the prior decision of this court.

III.

The special master who heard this matter found that City National was entitled to no recovery, since the expenses for which it sought reimbursement were incurred

in the prosecution of its own claims and not in defense of claims against it. This finding was adopted by the trial court and the petition was dismissed.

The circuit court of appeals in violation of rule 52 of the Rules of Civil Procedure for District Courts of the United States ignored this finding which was fully justified by the evidence, and based its decision upon an alternative finding of the special master which was not approved by the trial court and was applicable only if the primary finding denying recovery had not been adopted by the trial court.

IV.

There is no precedent for recovery in this case. The rule permitting reimbursement for litigation expenses is only applicable to a case where a beneficiary of a trust has unsuccessfully attacked the trustee. Here the attack was not by a beneficiary of a trust but by a bankruptcy trustee pursuing his statutory duty to object to the allowance of claims against the estate deemed by him to be improper.

V.

The mandate of the circuit court of appeals directed entry of judgment in the trial court in favor of City National for the full amount claimed, approximately $20,500. This deprived petitioner of a hearing on the sufficiency of the proof to justify the allowance of particular items of claimed expense. The only prior hearing on this phase of the case was before the special master. The district court never had occasion to pass upon this question of the sufficiency of the proof on the various items, since the controversy was disposed of by that court on the master's primary finding that there should be no recovery.

ARGUMENT.

I.

Petitioner's motion to dismiss the appeal in the circuit court of appeals should have been granted.

City National's petition, filed May 12, 1941 in the district court, alleged that "the indenture trustee is entitled in equity and by the law of Illinois to recover out of the trust estate now under the jurisdiction of this court all expenses and charges reasonably and necessarily incurred in and about the successful defense of said (the bankruptcy trustee's) counterclaim, including reimbursement for the reasonable fees of its counsel amounting to $15,000." (R. 141)

The other items of expenses, all or part of which were sought to be recovered, were as follows:

(a) Fees of auditors and expert witnesses, $1,260;

(b) Court reporter's fees, $1,777.35, and money paid the clerk of the Circuit Court of Appeals for printing the record in the previous appeal, $1,475;

(c) Expense of printing various briefs in the Circuit Court of Appeals and in the Supreme Court of the United States, and other miscellaneous expenses of appeal, $2,191.63.

Section 242 of the Bankruptcy Act (11 U.S.C. 642)*

* Sec. 242 is as follows:

The judge may allow reasonable compensation for services rendered and reimbursement for proper costs and expenses in-

permits allowances for expenses incurred in the administration of an estate. The basis for an allowance of reimbursement to a trustee for its successful defense is that it has incurred the expense in administering the estate. (See *Patterson* v. *Northern Trust Company*, 286 Ill. 564, 569, and *Waterman* v. *Alden*, 144 Ill. 90, cited by the circuit court of appeals.) The claimant here sought *reimbursement*. Section 250 of the Banruptcy Act (11 U.S.C. 650)** covers appeals from orders making or refusing to make allowance of compensation or *reimbursement*. Appeals from such orders may be prosecuted only by leave of the circuit court of appeals. Since the decision of this court in *Dickinson Industrial Site* v. *Cowan*, 309 U.S. 382, there has been no doubt on this subject. Such appeal must be taken not later than forty days from

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curred in connection with the administration of an estate in a proceeding under this chapter or in connection with a plan approved by the judge, whether or not accepted by creditors and stockholders or finally confirmed by the judge—

(1) by indenture trustees, depositaries, reorganization managers, and committees or representatives of creditors or stockholders;

(2) by any other parties in interest except the Securities and Exchange Commission; and

(3) by the attorneys or agents for any of the foregoing except the Securities and Exchange Commission.

** Sec. 250 is as follows:

Appeals may be taken in matters of law or fact from orders making or refusing to make allowances of compensation or reimbursement, and may, in the manner and within the time provided for appeals by this title, be taken to and allowed by the circuit court of appeals independently of other appeals in the proceeding, and shall be summarily heard upon the original papers.

the entry of the order appealed from. (Bankruptcy Act, Section 25(a), 11 U.S.C. 48(a)***.)

The order here appealed from was entered October 4, 1944. (R. 245) The case was not before the Circuit court of appeals in any manner until the record was filed February 1, 1945, more than three months after the entry of the order sought to be reviewed and more than two months after the time for the presentation of the matter to the circuit court of appeals had expired.

The circuit court of appeals held that the petition of City National presented neither a claim nor a petition for reimbursement (R. 281), but that if the appeal should have been by leave, it was then allowing the appeal, and cited *Reconstruction Finance Corporation* v. *Prudence Securities Advisory Group,* 311 U.S. 579, as justifying this action. The circuit court of appeals apparently misunderstood this decision. This court there held that the filing of a petition for leave to appeal was not jurisdictional. It did not hold that failure to bring the matter before the circuit court of appeals within the statutory time was not jurisdictional, as apparently the circuit court of appeals in this case believed. The record in *Reconstruction Finance Corporation* v. *Prudence Securities Advisory Group* discloses that the case there *was* before the circuit court of appeals within the statutory time, although not formally presented by petition for leave to appeal. The opinion of

*** Sec. 25(a) is as follows:

Appeals under this title to the Circuit Court of Appeals of the United States and the United States Circuit Court of Appeals for the District of Columbia shall be taken within thirty days after written notice to the aggrieved party of the entry of the judgment, order or decree complained of, proof of which notice shall be filed within five days after service or, if such notice be nor served and filed, then within forty days from such entry.

the Circuit Court of Appeals for the Second Circuit likewise discloses this fact (*In re Prudence Bonds Corporation*, 111 F. 2d 37, at 40-41).

The similarity between this case and *Reconstruction Finance Corporation* v. *Prudence Securities Advisory Group* ends with the fact that in both cases there was no petition for leave to appeal. Failure in this case to bring the case before the circuit court of appeals in any way until more than 2 months after the statutory time to do so had expired makes this case clearly distinguishable.

II.

The previous decision in this case controls.

This court in *Woods* v. *City National Bank and Trust Company of Chicago*, 312 U.S. 262, held that City National, having acted in dual and conflicting capacities, was entitled to no fees and expenses other than those expenses which directly benefited the estate. No claim is made in the present controversy that the expenses sought to be recovered benefited the estate.

In the previous case, the following claims were before this court:

(1) City National sought fees and expenses arising from the state court foreclosure which preceded the bankruptcy court reorganization proceedings. (R. 41-43) The foreclosure was superseded by the bankruptcy and hence was of no benefit to the estate.

(2) The attorneys for City National, who also represented the bondholders committee, and whose fees for the defense of City National are now sought in this case, requested fees for: (a) services rendered City National

from 1933 onward in the foreclosure suit and other litigation outside the bankruptcy reorganization proceedings (R. 66-78); (b) services to the bondholders committee from 1933 through the bankruptcy case (R. 80-88); and (c) services to City National in the bankruptcy proceedings (R. 78-80) including defense against the counterclaim of the bankruptcy trustee. (R. 97, 98) This latter item is the same claim now presented, but all of the services had not been performed at the time the application for fees was originally presented.

(3) The bondholders committee sought recovery of its out-of-pocket expenses incurred in conducting its affairs from 1933 through the bankruptcy reorganization, fees for City National for its services as depositary for the committee, and also compensation to City National for furnishing operating personnel and office facilities for the committee. (R. 51-60)

It is thus apparent that the prior case in this court involved claims for fees and expenses relating to the administration of the estate outside the bankruptcy court, as well as claims for fees and expenses relating to the formulation, approval and carrying out of the plan of reorganization.

This court denied all claims for fees.

With reference to the expense items, this court stated:

> "Some discrimination, however, is necessary in applying the foregoing rule to claims for expenses. Reimbursement for proper costs and expenses incurred in connection with the administration of the estate may be allowed. The rule disallowing compensation because of conflicting interests may be equally effective to bar recovery of the expenditures made by a claimant subject to conflicting interests. Plainly expenditures are not proper within the meaning of the Act where the claimant cannot show that they were made in furtherance of a project exclusively

devoted to the interests of those whom the claimant purported to represent. On the other hand, these expenditures normally should be allowed which have clearly benefited the estate. Scott on Trusts (1939), Sec. 245.1. Thus where taxes have been paid, needful repairs or additions to the property have been made, or the like, equity does not permit the estate to retain those benefits without paying for them. Such classification of expenses, at times difficult, rests in the sound discretion of the bankruptcy court. The district court drew no such distinction but proceeded on the theory that reimbursement for all expenses must be denied. But it is not apparent that all of them fall within the prohibited category." (312 U.S. 262 at 269-270.)

The instant claim of City National is for the expenses which it incurred in the prior litigation and denominated by it as the expenses of its successful defense. Thus it claims 75% of the court reporter's fees and expense of printing the record and the briefs, 75% of the fees of its attorneys in prosecuting the former litigation, and all the expenses of expert witnesses produced by it in the trial court. (R. 141)

It is impossible to distinguish between the expenses now sought to be recovered and those administrative expenses not related to the plan on which this court previously denied recovery.

It is not decisive in this case that blameless trustees, when successfully defending against the attack of a beneficiary, have been held entitled to reimbursement from the trust estate not on the theory of benefit to the estate but because the expense was necessarily incurred in administering the estate.

Here the claimant is not blameless. By the prior adjudication of this court it has been held guilty of a substantial breach of trust by acting in dual and conflicting capacities. Hence this court limited claimant's recovery

to expenses beneficial to the estate. Since the expenses now sought were concededly not beneficial to the estate, no recovery is justified.

III.

The fact findings of the trial court were ignored by the circuit court of appeals.

The primary finding of the special master adopted by the trial court was that the expenses here sought to be recovered were incurred by City National in prosecuting its own claims and *not* in defense of the claims against City National. (R. 238) Thus the trial court dismissed the petition. (R. 245)

This finding of the trial court was ignored by the circuit court of appeals. Instead, the circuit court of appeals stated:

> "The special master found, and the district court approved the finding, that the attorney fee of $15,000 for defending against the counterclaim was reasonable, and that claimant's items of out-of-pocket expense, except an item of title expense for $1,135.30, which has been paid, were proper items of allowance. Under broad equitable principles those findings are certainly sound." (R. 282)

The finding above referred to was an alternative finding not approved by the district court and applicable only if the primary finding denying recovery should not be adopted by the trial judge to whom the special master was reporting.

In ignoring the primary finding of the master adopted by the trial court, and in relying upon the alternative finding of the master upon which the trial court did not pass and did not adopt, the action of the circuit court of appeals

is in direct conflict with rule 52 of the Rules of Civil Procedure for District Courts of the United States, which in accordance with long recognized previous law provides that findings of fact shall not be set aside unless clearly erroneous and that the findings of a master to the extent that the court adopts them shall be considered as the findings of the court.

Realistic appraisal of the record amply justifies the finding actually approved and acted upon by the trial court.

To recover fees and expenses in the original litigation, City National, its bondholders committee and its counsel, had to clear themselves of the charges of breach of trust, mismanagement and of acting in dual and conflicting capacities. The formal proof of the services rendered by the parties, taken before Referee Chindblom, was consolidated with the evidence heard by the district judge on the charges of breach of trust. One order of the district court, entered May 2, 1939, disposed of all of the issues. While City National might have insisted on a separate trial of those charges against it which, if sustained, might have resulted in a money judgment, it did not do so. There was but one trial covering all issues. Therefore, it had no separate expense of defending itself, as distinguished from the expense incurred in prosecuting its own claims.

In this court and in the circuit court of appeals there was one record. In the circuit court of appeals there was one argument, and one opinion of that court disposed of the whole matter (*City National Bank and Trust Company, et al* v. *Woods,* 111 F. 2d 834). This court denied certiorari on the bankruptcy trustee's claim for a money judgment against City National, so that that phase of the case never had to be argued in this court. No separation of the expense of preparing and printing those parts of the

record alleged to have had special reference to the claims for a money judgment against City National was made by respondent. (R. 195) There was no separation of the time its attorneys spent in defense of City National as distinguished from the time spent in prosecuting City National's claims for fees and expenses. (R. 201)

An examination of the detailed items of expense claimed further demonstrates the soundness of the trial court's conclusions. Briefly, the items are as follows:

(a) *Attorneys' fees*: 2,400 hours in the aggregate were spent by City National's attorneys in this matter, of which 700 hours were spent in the trial court and the balance on appeal. There is no segregation of the time spent other than that between the trial court and the appellate proceedings. (R. 201) As a conclusion, counsel made an allocation of 75% of the time to defense of the City National. (R. 198, 201) No facts support this conclusion. Analysis of the printed record in the prior proceedings positively negatives the conclusion. Counsel himself characterized this allocation as "arbitrary." (R. 201) There were, he said, "a number of law suits in one bunch." (R. 98)

(b) *The expenses of auditors and expert witnesses*: Recovery is sought for the fees paid to auditors who prepared the factual material contained in City National's report and account filed in these proceedings. This expense is not shown by the evidence to have been incurred because of any claim of the bankruptcy trustee against City National.

The bankruptcy trustee attacked City National for not receiving from the Arlington building, which was adjacent to the building of the debtor and also controlled by City National, adequate compensation for heat, light and refrigeration service furnished by the debtor's building to

the Arlington building. (R. 197) Therefore City National employed engineers who testified that the Arlington building had paid adequately for the services it received. The circuit court of appeals in the previous litigation, while finding that there was no fraud in the transaction, did state that it might have aroused some suspicion. (111 F. 2d 834 at 840) In the previous case, this court commented upon the conflicting interests of City National as follows:

> "In this case the indenture trustee was also indenture trustee for neighboring apartment properties and dominated the committees representing the bonds of those other companies. Two members of respondent committee were also members of one of those other committees. There was no unitary plan of reorganization for these several properties. But there were dealings between them by their common representatives—dealings attacked by petitioner as unfair to the instant company and defended by respondents as fair." (312 U.S. 262 at 267)

The controversy which required the employment of the engineers was provoked by the dual and conflicting capacities in which City National was acting. Any expense incurred on this phase of the case is clearly attributable to its adjudicated breach of trust.

(c) *Court reporter's fees and the expense of printing the record on the former appeals*: These expenses were incurred in making and printing the record used in both City National's unsuccessful appeal from the denial by the trial court of the claimed fees and expenses, in which it was the losing party, as well as in the other case in which it prevailed. The cost of printing the record could have been taxed as costs in City National's favor upon the conclusion of the litigation if it were entitled thereto. However, the mandates of this court properly taxed the costs in favor of the bankruptcy trustee, the prevailing

party, and against City National, the losing party. (R. 131-135)

No theory is advanced under which this adjudication can now be reviewed in the present proceedings.

(d) *Expense of printing briefs and other expense on appeal*: No discrimination between the various cases is shown in these items of printing and incidental expenses. No proof was made as to the $520.49 claimed for printing, travelling expenses, etc. (R. 144) The item of $669.36 was admittedly incurred *after* the denial of certiorari in Supreme Court case No. 310 on October 14, 1940, which set at rest any affirmative claim against City National. (R. 144)

IV.

There is no precedent for the allowance made to City National in this case.

The authorities cited by City National and adopted in the opinion of the circuit court of appeals as justifying reimbursement to City National for its expense of defense (R. 282) involve reimbursement to a fiduciary who has successfully defended itself against unjustified charges made against it by a beneficiary of its trust. No beneficiary here acted. City National was attacked by the trustee in bankruptcy pursuing his statutory duty of objecting to improper claims (Sec. 47(a)(8), Bankruptcy Act, 11 U.S.C. 75(a)(8).)*

No prior case has established the proposition that a trustee in bankruptcy who attacks the acts of a fiduciary, in resisting (by counterclaim as well as by other defenses)

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* Sec. 47(a)(8) is as follows:

Trustees shall * * * (8) examine all proofs of claim and object to the allowance of such claims as may be improper.

the claims of the fiduciary against the estate, thereby subjects the estate to payment of the fiduciary's attorney fees and other litigation expenses not recoverable as costs. Such a question is a serious one. If this be the law the interests of creditors and the administration of bankruptcy estates will be seriously jeopardized.

V.

The mandate should not have directed the entry of a judgment for the full amount claimed.

The mandate of the circuit court of appeals directed the district court to "enter an order directing Granada Apartments Hotel Corporation to pay the City National Bank and Trust Company of Chicago the amounts prayed for in its petition after deducting the title expense in the sum of $1,135.30, which has been paid to the City National". (R. 285)

This deprived petitioner of a hearing on the question of whether the proof justified the allowance of particular items of claimed expense. The trial court, since it adopted the primary finding of the special master that there should be no recovery, had never passed upon the subsidiary finding of the special master as to the possible amount of recovery. Under the master's subsidiary finding the most that City National might have recovered was less than $7,500.

We have previously pointed out the infirmities in the proof as to specific items claimed. With a $7,500 ceiling on recovery, the details were relatively unimportant. With a possible recovery of the full amount claimed, over $20,000, petitioner is clearly entitled to the judgment of the trial court as to whether the proof justifies the recovery of each item claimed.

CONCLUSION.

Petitioner's motion to dismiss the appeal should have been allowed by the circuit court of appeals. In the alternative, on the merits, this case presents nothing more than an attempt to avoid the prior decision of this court in this controversy. Respondent is seeking to shift to the bankruptcy estate the expense of its unsuccessful prosecution of its fee claims. The district court order should have been affirmed.

We respectfully submit that the writ of certiorari here sought should be granted.

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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946.

No. 613

IN THE MATTER OF
GRANADA APARTMENTS, INC., A CORPORATION,
DEBTOR.

GRANADA APARTMENTS HOTEL CORPORATION,
A CORPORATION,
Petitioner,

vs.

CITY NATIONAL BANK AND TRUST COMPANY OF CHICAGO, INDIVIDUALLY AND AS SUCCESSOR TRUSTEE,
Respondent.

ANSWER OF THE RESPONDENT, CITY NATIONAL BANK AND TRUST COMPANY OF CHICAGO, TO PETITION FOR CERTIORARI OF GRANADA APARTMENTS HOTEL CORPORATION.

VINCENT O'BRIEN,
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ANSWER OF RESPONDENT, CITY NATIONAL BANK AND TRUST COMPANY OF CHICAGO, TO PETITION FOR WRIT OF CERTIORARI OF GRANADA APARTMENTS HOTEL CORPORATION.

PRELIMINARY.

Having in mind the admonition to the bar in *Furness Withy & Co., Ltd.* v. *Yang Tsze Ass'n.*, 242 U. S. 430-434, and its reiteration in *Southern Power Co.* v. *North Carolina Public Service Co.*, 68 L. Ed. 413, and *Keller* v. *Adams-Campbell Co.*, 68 L. Ed. 705, it is our duty to point out to the Court that the petition contains important omissions and inaccuracies which are misleading as to the questions which this case involves. This has necessitated a more lengthy answer than should have been necessary.

SPECIFICATION OF OMISSIONS AND INACCURACIES IN THE STATEMENT OF THE FACTS.

Petitioner's characterization on page 3 of what was pending before the District Court in September, 1937, is totally inadequate and is misleading. On that date there were the following matters for disposition:

1. Paragraph 5 of claim No. 9, filed by City National on June 23, 1937, for the amounts found to be due to it by the state court foreclosure decree on account of its trustee's fees, its costs and attorneys' fees in the state court foreclosure proceeding; the objection of the trustee in bankruptcy thereto, filed July 8, 1937, to the effect that the claim was informal, lacking the original documents and unfounded and lacking in merit; and the trustee in bankruptcy's further objections thereto contained in Subdivision D of the multiple document filed by him on September 9, 1937, to the effect that the decree is void and not binding on the federal court because the City National and its counsel, who also represented the committee, were serving conflicting interests and because the Trustee, being in possession of the property as owner, cannot charge for the services of itself or its counsel (R. 41; 28).

2. The account and report of City National of its operation of the property as Mortgage Trustee in possession thereof and the trustee in bankruptcy's Suggestions, contained in Subdivision F of the multiple document filed by him on September 9, 1937, wherein he asks that the court falsify and disallow various items of expenditures made by the City National during the course of its operation of the property (R. 11; 31).

3. The trustee in bankruptcy's counterclaim against City National, contained in Subdivision E of the multiple document filed by him on September 9, 1937, wherein he sets forth various acts of misfeasance and nonfeasance of City National as Trustee in possession, which he claims resulted in injury to the property or in diminution of the income which should have been obtained therefrom, and City National's answer thereto filed on September 18, 1937 (R. 29; 61).

4. The petition of the committee and the fee petition of this firm as attorneys for the committee for administrative allowances on account of expenses incurred and services performed in the 77B proceeding, both of which were filed September 14th, 1937 (R. 46; 51).

The District Judge retained and himself heard the evidence on the trustee in bankruptcy's counterclaim and the City National's answer thereto and the evidence in relation to surcharging and falsifying the City National's account as Trustee in possession (Items 2 and 3 above). This hearing lasted for about three weeks, commencing September 21, 1937, and ending October 13, 1937 (R. 186; P. R. 171-464, 504-658).*

The petitions of the committee and its attorneys for expenses and services in connection with the plan, and also the claim of City National (claim No. 9) and the objections of the trustee in bankruptcy to paragraph 5 thereof (Items 1 and 4, *supra*) were referred to a referee on October 14, 1937, to take and report the evidence without findings of fact or conclusions of law (P. R. 658-662).

When the referee's report was filed the district judge on October 21, 1937, entered an order consolidating the evidence taken before the referee on the fee and expense petitions of the committee and its counsel and on City

* (P. R. denotes Record in Nos. 281 and 282 in this Court.)

National's claim No. 9 and the objections thereto with the evidence theretofore taken before the court on the court trustee's objections to the City National's account and report as Trustee in possession and on the court trustee's counterclaim and the City National's answer thereto, and he took the matter under advisement (P. R. 712). Contrary to petitioner's statement on page 3, no "additional" evidence was taken before the court on the fee and expense claims. The entire trial before the court was on the counterclaim and surcharge and nothing else.

On May 2, 1939, the district judge made and entered findings of fact and conclusions of law (R. 104-129). He found that, because of the inter-relation and conflicting interests of the City National, the bondholders' committee and the firm of attorneys acting for both, the fee petition of the committee and the fee petition of the attorneys for the committee for administrative allowances on account of services performed in the 77B proceeding (Item 4, *supra*), as well as paragraph 5 of City National's claim No. 9 based on the foreclosure decree (Item 1, *supra*), should be disallowed and dismissed for want of equity (Finding 50; R. 123). He also found that the trustee's Suggestions for surcharging and falsifying City National's account as Mortgage Trustee in possession (Item 2, *supra*), as well as his counterclaim against City National (Item 3, *supra*) were supported by the evidence and that specific amounts, with interest from various dates, in a total of approximately $100,000.00, were due to the debtor estate from City National (Findings 54 and 55; R. 124, 125). The court then found, however, that justice would best be served by merely setting off the opposing claims and contentions and leaving the parties to the accounting where they were with no cash recovery to be allowed the trustee in bankruptcy (Findings 57 and 58; R. 123). Accordingly

the said fee petitions and paragraph 5 of said claim 9 were denied by the decree then entered (R. 129).

After the mandate of this court had been filed, City National, for the first time, filed its petition for reimbursement of the expenses incurred by it in its successful defense of the trustee in bankruptcy's $100,000.00 counterclaim and surcharge. Granada Apartments Hotel Corporation and Fred E. Law filed a motion to strike the petition on the ground that the opinion of this Court barred any recovery. The special master to whom the petition and motion to strike were referred filed a report recommending that the motion be denied and that the cause proceed to hearing to fix the amount due City National (R. 214, 216). Objections and exceptions to the report were filed by Granada Apartments Hotel Corporation and Fred E. Law (R. 217). It was then agreed that, in order to avoid the possible necessity of two appeals, the motion to strike the petition should be withdrawn and the matter should be re-referred to the special master to determine what amounts were due to City National on account of the expense incurred by it in its defense of the counterclaim and surcharge so that the matter could be appealed as a whole (R. 226). Accordingly, an order was entered withdrawing the motion to strike and ruling Law and Granada Hotel Apartments Corporation to answer the petition and re-referring the petition and answer to the master for the purpose of determining the expense so incurred by City National (R. 219). On the re-reference, extensive evidence, which consisted largely of the report of the evidence theretofore taken before a referee, was introduced as to the expense so incurred, including attorneys' fees (R. 225-230; 158-205). The master, although holding that no recovery could be had for reasons of law, nevertheless found that the items of expense set forth in City National's

petition were in fact expended in defense of the counterclaim and attempted surcharge, and that the requested attorneys' fees, in the amount of $15,000.00 for 2404 hours of service in defense of the counterclaim, were reasonable (R. 239). No objections or exceptions were filed by the petitioner to that finding and the report was approved by the lower court (R. 245).

We call the Court's attention to the fact that the opinion of the circuit court of appeals at Record 274 was subsequently amended by order of that court (R. 286).

NONE OF THE REASONS ADVANCED BY PETITIONER FOR ALLOWANCE OF THE WRIT ARE SUPPORTED BY THE RECORD.

I.

The Denial of the Motion to Dismiss the Appeal Does Not Conflict With the Decision of This Court In Dickinson Industrial Site v. Cowan, 309 U. S. 382; Nor Does It Involve a Misconception of the Rule Laid Down In Reconstruction Finance Corporation v. Prudence Securities Advisory Group, 311 U. S. 579.

Dickinson Industrial Site v. *Cowan*, 309 U. S. 382, merely holds that an order allowing fees to a bondholders committee is an order "making or refusing to make allowances of compensation, or reimbursement" within the meaning of Section 250 of the Chandler Act and that, therefore, the appeal in that case was properly taken by petition for leave to appeal. Nothing in that decision, even remotely, indicates that the order in the case at bar was one "making or refusing to make allowances of compensation or reimbursement," within the meaning of that section. On the contrary, the court's definition of the kind of orders covered by Section 250, as well as the history of that section, clearly exclude the order here involved. As the court said, Section 250 was derived from Section 77B c (9), which provides that the court may allow compensation for the services rendered and reimbursement for actual and necessary expenses incurred in connection with the proceeding and the plan by officers, parties in interest, depositaries, reorganization managers and committees or other representatives of creditors or stockholders and the attorneys

or agents of any of the foregoing and of the debtor. It was with this prior section in mind that the court, in defining who are claimants for fees and reimbursement within the meaning of Section 250, said:

> "Fee claimants are either officers of the court or fiduciaries, such as members of committees, whose claims for allowances from the estate are based only on service rendered to and benefits received by the estate."

Obviously, City National's claim for reimbursement of the expense incurred by it in successfully resisting the trustee in bankruptcy's affirmative suit for damages does not come within that category.

A trustee is entitled to reimbursement out of the trust estate for its expenses, including attorney's fees incurred in successfully defending against an attempt to surcharge or falsify its account or to obtain a money judgment against it for acts of misfeasance or malfeasance. (*Patterson* v. *Northern Trust Company,* 286 Ill. 564; *Waterman* v. *Alden,* 144 Ill. 90; Perry on Trusts, § 894; Lewin on Trusts, 12th Ed. 1267; Scott on Trusts, Vol. II, § 188.4, p. 1006.)

That is a broad, equitable principle and the district court sitting in bankruptcy is a court of equity and is guided by equitable principles, except in so far as they are inconsistent with the Bankruptcy Act. (Bankruptcy Act Secs. 2 and 115, 11 USCA, § 11 and 515; *Securities & Exchange Commission* v. *U. S. Realty & Improvement Co.,* 310 U. S. 434.)

It was as a court of equity and pursuant to the equitable principle that a trustee which successfully defends itself against unwarranted and unsupported charges is entitled to reimbursement from the trust estate that the district judge allowed the City National's petition to be filed over objection and directed that it stand as a claim.

It was because we viewed the City National's right to reimbursement as coming within this equitable principle that in paragraph 13 of its petition for reimbursement we said:

> "The findings of mismanagement and fraud having been reversed and the counter-claim so brought by the Court Trustee having thus been successfully defended, the indenture Trustee is entitled in equity and by the law of Illinois to recover out of the trust estate now under the jurisdiction of this court all expenses and charges reasonably and necessarily incurred in and about the successful defense of said counter-claim, including reimbursement for the reasonable fees of its counsel amounting to Fifteen Thousand Dollars ($15,000). And thus its petition for such allowances is addressed to the court as a court of equity and is not made to the court under the provisions of any bankruptcy law, the controversy between the Court Trustee and the indenture Trustee in this respect, although heard in the same proceeding, being plenary in nature and entirely severable and independent, with the same effect as though the Court Trustee had brought his said action in any equity court of appropriate jurisdiction." (R. 141.)

It is merely a play on words for the petitioner to say that, since Section 242 of the Bankruptcy Act permits allowance *for expenses incurred in the administration of an estate* and since the basis of the City National's present claim is *expenses incurred in the administration of an estate* our present case is one for an allowance under Section 242 and hence the appeal should have been by leave under Section 250. Section 242 relates to allowances for "expenses incurred in the administration of an estate in a bankruptcy proceeding under this chapter." City National's defense of the trustee in bankruptcy's affirmative action was not a proceeding under Chapter X of the Bankruptcy Act. It was a plenary proceeding in equity. City National would

have been entitled to insist that the trustee in bankruptcy proceed by a separate action in the state court. (*Harris Trust and Savings Bank* v. *Keig*, 98 F. (2d) 952.) The fact that it consented to allow the bankruptcy court to hear the matter did not change the character of the proceeding. It was none the less a plenary proceeding in equity. (*In re Rockford Produce & Sales Co.*, 275 F. 811.) The district judge so viewed it when in his findings of fact he said:

> "City National, Bondholders Committee and their counsel by pleadings filed, agreements made and evidence offered before the Judge in open court, have all *consented to* and conducted here a *plenary* litigation. They have asked the Court to decide *a plenary accounting in equity*. Upon this record made by pleadings, petitions and evidence, said *respondents* cannot be permitted to say that any of them do not consent and cannot be permitted to say that the proceedings were or are summary. *These proceedings are plenary.*" (R. 107.) (Italics ours.)

Clearly, the order from which the appeal in the case at bar was taken was not an order making or refusing to make allowances of compensation or reimbursement within the meaning of Section 250 and the decision of the circuit court of appeals in so holding is not in conflict with the decision of this Court in *Dickinson Industrial Site* v. *Cowan*, 329 U. S. 382.

As the appeal was properly taken by notice of appeal, misconception of the rule laid down in *Reconstruction Finance Corporation* v. *Prudence Securities Advisory Group*, 311 U. S. 579, would not be grounds for granting a writ of certiorari. However, we submit that the rule was not misconceived by the circuit court of appeals.

Petitioner says that the record, as well as the opinion of the circuit court of appeals in the *Prudence Securities Advisory Group* case discloses that that case was before

the circuit court of appeals within the thirty day period prescribed by Section 25 (a). If so, that fact is not even mentioned in, and is certainly not the basis of, the dissenting opinion of Judge Hand, nor is it the basis of the opinion in this Court.

Under Rule 73 (a) of the Rules of Civil Procedure it is the filing of the notice of appeal in the district court within the time prescribed, not the filing of the record in the circuit court of appeals, which perfects the appeal and is the only step which is jurisdictional. In the case at bar notice of appeal was filed in the district court within the time allowed for taking an appeal by petition for leave to appeal—that is, within the time prescribed by Section 25 (a). Under the decision of this Court in the *Prudence* case that was sufficient to give the circuit court of appeals jurisdiction.

II.

The Decision of the Circuit Court of Appeals Is Not In Conflict With the Decision of This Court In Woods v. City National Bank and Trust Company of Chicago, 312 U. S. 262.

As its second reason for the granting of the writ, petitioner says that the prior case of *Woods* v. *City National Bank* is a bar to recovery of the costs incurred by City National in defense of the trustee in bankruptcy's affirmative suit for two reasons: First, because this very same claim for reimbursement of expenses now made was before this Court in the prior case and this Court disallowed the recovery of all claims then before it unless it could be shown that the expense sought to be recovered benefited the estate, which this one certainly did not.

To support this argument, the petitioner lists the claims for fees and expenses which were before this Court in the

previous case and, in listing the services for which the attorneys for City National were asking an allowance, says:

> "• • • and (c) services to City National in the bankruptcy proceedings (R. 78-80) including defense against the counterclaim of the bankruptcy trustee. (R. 97, 98.) This latter item is the same claim now presented, but all of the services had not been performed at the time the *application* for fees was originally presented." (Italics ours.)

The implication is that the petition or application of ourselves as attorneys for City National included at least some of the services rendered in defense of the counterclaim and surcharge; that the same item of expense was among those disallowed by the decree of the district court and that the disallowance was affirmed by this Court. To put it mildly, this is another instance of the inaccuracies upon which the petition for certiorari is predicated.

At the time of the decision and decree in the lower court the only claim or petition on file for fees or for reimbursement of City National or of ourselves as their attorneys was paragraph 5 of claim 9 for the fees and expenses allowed by the foreclosure decree (R. 43).

It is true, of course, that the testimony of Mr. O'Brien before the referee to whom all claims and petitions for allowances were referred, contains a complete resume of all the services theretofore rendered by City National and its attorneys, as well as of all the services and expenses which they expected to perform or incur in the future, including the services and expenditures in connection with the counterclaim and surcharge. The reason therefor is understood by this Court and should have been understood by counsel for petitioner. In a bankruptcy proceeding the court naturally wants to know what fees and expenses have already been allowed

in the administration of the estate as well as what may have to be allowed in the future as a guide in determining what should be allowed on the petitions then before it. Hence it was that there was testimony before the referee as to the services heretofore performed by attorneys for City National in reference to the furniture litigation with Albert Pick & Co. (R. 66-72) and in connection with the prior bankruptcy proceeding in Danville, Illinois (R. 75-77), for both of which the attorneys of City National had long since been paid in full (R. 72, 77) and for which they were not then requesting an allowance (R. 89). It was for this same reason that Mr. O'Brien detailed the work so far performed by our firm as attorneys for City National in connection with the counterclaim and surcharge but expressly stated that no petition for those services had been presented as they were not completed (R. 66, 67). Naturally, Mr. O'Brien's estimate of the total request for fees which we might eventually make if in the end we successfully defended against the counterclaim and surcharge included the work done up to that point in connection with the surcharge and counterclaim (R. 97, 98). But at the time the decree in the lower court was entered, no petition for attorneys' fees incurred in connection with the counterclaim was on file and no request for reimbursement for other costs incurred up to that time in connection with the counterclaim had been presented. Such a petition then would have been premature. As said by this Court in *Sprague* v. *Ticonic National Bank,* 307 U. S. 161, page 167:

> "• • • Certainly the claim for 'as between solicitor and client' costs was not directly in issue in the original proceedings by Sprague. It was neither before the Circuit Court of Appeals nor before this court. Its disposition, therefore, by the mandate of either court could be implied only if a claim for such costs was necessarily implied in the claim in the original

> suit, and its failure to ask for such costs an implied waiver. These implications are repelled by the basis on which such costs are granted. They are not of a routine character like ordinary taxable costs; they are contingent upon the exigencies of equitable litigation, the *final disposition* of which in its entire process including appeal place such a claim in much better perspective than it would have at an earlier stage."

That is why the decree from which the appeal was taken merely disallowed the petitions and claims then on file and said nothing in reference to fees and expenses which might subsequently be claimed in connection with the defense of the counterclaim (R. 129).

We submit that on an accurate statement of the facts this ground for granting a writ of certiorari disappears.

Secondly, petitioner says that even if City National's present claim for reimbursement of its expense in defending against the counterclaim was not included in the claims for fees and for disbursements of expense heretofore expressly disallowed by this Court, nevertheless, the recovery thereof is barred because the same principles which barred recovery of the fees and expenses there involved are equally applicable to those now sought.

Mr. Justice Douglas's opening statement is:

> "The basic question involved in this case concerns the power of the district court in proceedings under Chapter X of the Chandler Act to disallow claims for compensation and reimbursement on the grounds that the claimants were serving dual and conflicting interests."

The remainder of the decision deals entirely with the denial of compensation for services where the conflict of interest may have damaged the estate.

But, in defending itself against the counterclaim and attempted surcharge of the trustee in bankruptcy, no

possible conflict of interest on the part of City National was involved. It was not acting in a representative capacity but solely in its own behalf.

Denial of compensation to a trustee where there is a conflict of interest, is predicated on the failure of the trustee to properly represent its beneficiaries. The denial is not punitive, but is due to the failure of proper representation. This is recognized by Mr. Scott in his work on Trusts, Section 243, and in the American Law Institute Restatement of the Law of Trusts, Section 243. They clearly show the basis for refusal of compensation is not on the theory of a penalty, but that payment is not due for services not properly performed. That being so, there is no basis on which the City National can be denied reimbursement for its outlays incurred solely in its own defense and not in a representative capacity.

The doctrine that the denial of compensation is not punitive must not be confused with the holding of this Court in the case of *Woods* v. *City National,* 312 U. S. 262, that, where denial of compensation is sought because of conflict of interest, it is only necessary to show that the conflict existed and that it is no answer to say that fraud or unfairness were not shown to have resulted. As this Court said, that is because the incidence of a particular conflict of interest can seldom be measured with any degree of certainty and the court need not speculate as to whether the conflict resulted in damage to the estate in the performance of services where it might have done so. In other words, the denial is based on the difficulty of proof and not on the theory of punishment.

Surely, if this Court intended to sweep aside the long-established principle that denial of compensation is not punitive and intended to say that if the indenture trustee ever asked for compensation for its defense of the counter-

claim, which was based on mismanagement and not on conflict of interest, it should, nevertheless, be denied compensation because of conflict of interest in other matters, the Court would have said so in explicit and unmistakable language.

We submit that recovery of the expense incurred by City National in successfully defending against the affirmative suit of the trustee in bankruptcy is neither expressly nor in principle barred by decision of this Court in *Woods* v. *City National*, and that the claimed conflict with that decision is not grounds for granting the writ.

III.

The Fact Findings of the Trial Court Were Not Ignored by the Circuit Court of Appeals But, on the Contrary, Were Adopted and Followed by That Court.

Petitioner asserts that the circuit court of appeals has ignored the master's "primary finding of fact" that the expenses now sought to be recovered were incurred by City National in prosecuting its own claims for fees and disbursements and not in defense of the counterclaim and asserted surcharge.

Petitioner thereby confuses the Master's conclusion of law with his findings of fact on the question of the claimed expenses.

The master's only finding of fact in reference to the claimed expenses is that:

> "The Bank has requested the Special Master to make a finding as to the reasonableness of the expense incurred by the Bank in its alleged defense of the counterclaim. The items of expense are contained in Exhibit A attached to the sworn petition, and while objection has been made by the debtor, they are not

> expenses arising out of defense of the counterclaim, the Special Master, from all the evidence, including the report of the referee finds such items were incurred by the Bank in the objections and counterclaim of the trustee and are proper items of allowance with the exception of the title expense in the sum of $1,135.30, which has been paid under order of Court. The requested attorneys' fee is $15,000.00 for 2404.3 hours of service, which is reasonable." (R. 239.)

The master was of the opinion, however, that although these expenses were incurred in defense of the counterclaim, they were unrecoverable as a matter of law because prosecution by City National of its own claims required it to meet the charges of breach of trust asserted against it in the counterclaim. The master, accordingly, concluded:

> "It may be fairly said, therefore, petitioner was not exclusively engaged in the defense of such action, but on the contrary, was engaged in the prosecution, subject to objections, of its several claims under the Bankruptcy laws. The burden of proof under 57A is on claimant and there are no provisions under Chapter X as Amended allowing claimants who prove their claims over objections to the expense they have incurred either in prosecuting or meeting objections thereto." (R. 238.)

It is this conclusion of law which petitioner now represents to be a finding of fact.

The circuit court of appeals did not commit error in reversing that conclusion of law.

There can be no dispute as to what pleadings were filed. In the forepart of this answer we have shown that mismanagement of the property was not interposed as a defense to paragraph 5 of claim 9, nor to the fee petitions, and that petitioner's statement to the contrary at page 3 of its petition is not supported by the record. The only

objection raised to claim 9 and the fee petitions was that City National and the committee were serving conflicting interests (R. 28). As we have heretofore pointed out, the sole issue on the trial before the district judge, which lasted for three weeks, was made by the trustee in bankruptcy's asserted surcharge and counterclaim and City National's answer thereto. That trial was a plenary suit in equity for a money judgment and not a hearing in the bankruptcy proceeding of the trustee in bankruptcy's defense to claim 9 and the fee petitions. The district judge recognized this when he found:

> "City National, Bondholders Committee and their counsel by pleadings filed, agreements made and evidence offered before the Judge in open court, have all *consented to* and conducted here *a plenary litigation.* They have asked the Court to decide *a plenary accounting in equity.* Upon this record made by pleadings, petitions and evidence, said *respondents* cannot be permitted to say that any of them do not consent and cannot be permitted to say that the proceedings were or are summary. *These proceedings are plenary.*" (R. 107.) (Italics ours.)

However, City National's right to reimbursement of its expenses in defending against the mismanagement charges would not be affected even if they had been assigned by the trustee in bankruptcy as one of the grounds for denial of fees so long as mismanagement was also asserted as the basis of a $100,000 surcharge and counterclaim. The rule, which respondent concedes, that a trustee which successfully defends against an asserted surcharge of its account and a counterclaim is entitled to charge the estate with the expense so incurred, would be emasculated and rendered empty and meaningless if the law were otherwise. Trustees could be put to unlimited expense in successfully defending themselves against groundless charges made by the *cestui que trustents* or their representatives, and

whether they were entitled to recoup from the trust estate the expense to which they had been put would depend upon whether the unsupported charges had been made the basis of a money judgment only, or whether they had also been assigned as grounds for denying to the trustee its fees.

It is true that if there had been but one trial of all the issues, as petitioner insists there was, it might have increased the difficulty of proving the amount of expense incurred in defense of the attempted surcharge and counterclaim, as distinguished from the amount of expense incurred in connection with claim 9 and the fee petitions, but why or how that fact or the fact that there was but one judgment could affect the substantive right to recover is not suggested by petitioner. In fact, petitioner seems to concede, at least inferentially, that City National could have insisted that the trustee in bankruptcy bring his action in a separate suit in equity and, in that event, City National could have recovered the expenses of its successful defense. But why the character of the action was changed or why the City National's substantive rights were affected by consenting to have the action tried by the bankruptcy court is not disclosed.

In the forepart of this answer we have called the Court's attention to the circumstances which caused the master to make what petitioner calls the alternative finding as to the costs incurred in defense of the trustee in bankruptcy's unsuccessful suit. We also called the Court's attention to the fact that no objections or exceptions were filed thereto by petitioner. In that situation we do not believe that even if that finding of fact were totally unsupported by the evidence petitioner could question it in the circuit court of appeals and make the refusal of that court to overrule it the grounds for granting review here. However, the finding was amply supported.

(a) *Attorneys' fees:*

In arriving at the 700 hours spent in the trial court on the trustee's attempted surcharge and counterclaim, all time spent in preparing the fee petitions and claim 9, and making formal proof thereof before Referee Chindblom were eliminated (R. 197, 199). The trial before the district judge did not involve proof of the facts on which conflict of interest was predicated, which is the ground on which the fees and claim 9 were ultimately disallowed. The facts on which conflict of interest was predicated were admitted.

Although no segregation of the 1700 hours time spent in the upper courts was made, only 75% of the total time so spent was used as a basis in arriving at the requested fee (R. 198, 201). Contrary to petitioner's contention, analysis of the records and briefs shows that this allocation of time, and the master's finding that the requested fee based thereon is reasonable, is more than justified. The brief and argument dealt almost entirely with the questions of the findings of mismanagement on which the counterclaim and attempted surcharge were predicated. Inspection of the briefs shows that practically no space is devoted to conflict of interest.

(b) *The expenses of auditors and expert witnesses:*

The auditors were paid $50 for preparing figures necessary to the defense of the counterclaim. It was the trustee in bankruptcy's assertions and demands which made the detailed report necessary. We think that the master was correct in finding it a proper charge.

The fact that City National was Trustee under the trust deeds of both the Granada and the Arlington and that the Granada furnished heat, light and refrigeration to Arlington was admitted and required no proof. That inter-

relationship, and not the question of whether Granada was receiving adequate compensation for the services, was one of the bases of denying fees. On the fee issue it would be quite immaterial whether the amount charged the Arlington was or was not adequate. But the testimony of the engineers that Granada was receiving a reasonable price for the service was necessary to City National's successful defense against the counterclaim. Although this Court held that the relationship created a conflict of interests, it, nevertheless, held that the suit for the asserted underpayment for the services furnished was unwarranted.

(c) *Court reporter's fees and the expense of printing the record on the former appeals:*

As to reporter's charges:

The only court reporter's fees for which partial reimbursement is requested are those for reporting the evidence in the trustee in bankruptcy's suit before the district judge for $100,000 thrice over. Reimbursement is not requested for any part of the court reporter's fees for reporting the proof before Referee Chindblom on the fee petitions and claim 9. As mismanagement was not asserted as a basis for disallowance of fees, there would not have been a trial on the mismanagement issues with the resulting expense, including the court reporter's fees, except for the asserted right to a money judgment.

The reporter was necessary so that the judge and the attorneys for both sides could have a transcript of the proceedings whether an appeal was or was not taken. Although the entire cost of the transcript of the proceedings before the district judge would properly be chargeable against the trust estate, reimbursement for only 75% thereof is requested in City National's petition (R. 141). The master found that to be fair and reasonable.

As to the cost of printing transcript of record:

An inspection of the transcript of record in our appeals to the circuit court of appeals Nos. 6986 and 7060 (Nos. 281-282 here) will disclose that it consists almost entirely of the transcript of the proceedings before the district judge on the trustee in bankruptcy's counterclaim. Only about 35 pages thereof consist of the testimony before Referee Chindblom on the fee petitions and claim 9. City National's appeal was taken not merely to reverse the disallowance of claim 9 and the fee petitions but to reverse the finding of mismanagement, because if they were not reversed, they would inevitably lead to a very large money judgment. To obtain that judgment it was necessary for the trustee in bankruptcy to show that the findings of mismanagement were warranted and, if he succeeded in doing so, the judgment would necessarily follow as a matter of law. The transcript of evidence contained in the consolidated record in our appeals Nos. 6986 and 7060 was incorporated into the record in the trustee in bankruptcy's appeal No. 7061 by order of the circuit court of appeals, and the order directed that it need not be reprinted. Regardless of who initially caused the transcript of the proceedings before the district judge to be printed, it was an expense necessarily incurred in bringing before the courts of review the question of whether the trustee in bankruptcy was entitled to a money judgment on his counterclaim.

As we have heretofore pointed out, the trustee in bankruptcy asserted the mismanagement charges in his pleadings solely for the purpose of obtaining an affirmative judgment and the printed transcript of the evidence on the trial of the mismanagement charges was essential to his persistent efforts in the upper courts to obtain that judgment.

This Court also took the view that the mismanagement

charges and the transcript of the proceedings before the district judge related to the surcharge and counterclaim and not to claim 9 and the fee petitions. It accepted the trustee in bankruptcy's appeal from the circuit court of appeals' allowance of fees and claim 9, and denied them solely on the ground of conflict of interest, while refusing to grant the trustee in bankruptcy's petition for a writ to have the findings of mismanagement reinstated and a money judgment entered.

The City National's petition asks for only 75% of the cost of printing the record and we submit that, again, the master's finding that that much of the printing cost was incurred on account of the asserted surcharge and counterclaim is well supported (R. 141).

Petitioner's statement that the mandate of this Court properly taxed the costs in favor of the trustee in bankruptcy and that no theory is advanced under which this Court can review that adjudication carries the implication that the cost of printing the record was taxed against City National. That is not a fact (R. 131-135).

(d) *Expense of printing briefs and other expense on appeal:*

Petitioner suggests that the cost of printing our briefs in this Court in consolidated cases Nos. 281 and 282 is not properly chargeable, because it was incurred after the petition for certiorari in this Court in case No. 310 had been denied and that the denial set at rest any affirmative claim against City National.

Only three-quarters of this printing cost is requested (R. 141, 142). Inspection of our brief, as well as that of the trustee in bankruptcy, will disclose that most of the argument in Nos. 281 and 282 is devoted to the findings of mismanagement.

When the briefs were prepared the question of whether a money judgment should be entered was still a live issue, although certiorari had been denied in case No. 310. Neither the grounds for the denial of that petition nor the granting of the other were announced by the Court. The trustee in bankruptcy was still pressing for the entry of a money judgment which certainly this Court had power to enter if, upon the full briefs and the oral argument in 281-282, it was convinced that the mismanagement charges were well founded. The opinion of this Court in 281-282 considered the mismanagement charges and concluded that recovery on the counterclaim would not be warranted. Why would it consider that question if power to enter the judgment had ceased with the denial of certiorari in No. 310?

Even after the opinion was rendered in 281-282, the trustee in bankruptcy filed a motion in this Court for leave to file a petition for rehearing, in No. 310, and cited decisions of this Court in support of its power to grant the petition at that late date. In that petition the trustee in bankruptcy said, among other things:

> "On February 3 last, your Honors delivered the opinion of the Court in cases 281-282. Then for the first time (which was more than 25 days after the petition for writ of certiorari in case No. 310 had been denied) the reason for your Honors in so granting certiorari in cases 281-282 became known to this petitioner."

It was likewise the first time that it became known to us.

IV.

In Allowing Recovery to City National of the Expense Incurred In Defense of the Trustee In Bankruptcy's Suit, the Circuit Court of Appeals Correctly Applied Well-Established Principles of Law to the Particular Situation.

Petitioner admits that the authorities cited in the opinion of the circuit court of appeals establish that City National would be entitled to recover the costs incurred by it in defending against the attempt to surcharge its account and to recover a money judgment for mismanagement of the trust property if the suit had been brought by a beneficiary of the trust. Petitioner says, however, that there is grave doubt as to whether that principle of law is applicable because the trustee in bankruptcy rather than a beneficiary filed and prosecuted the suit and that in doing so the trustee in bankruptcy was merely pursuing his statutory duty under Section 47 (a) (8) of the Bankruptcy Act of objecting to improper claims.

The answer is that the trustee in bankruptcy prosecuted the suit on behalf of and for the benefit of the beneficiaries and in so doing he was not objecting to a claim under Section 47 (a) (8). As we have heretofore pointed out, the acts of alleged mismanagement on which the surcharge and counterclaim were based were not interposed as a defense to City National's claim. If the trustee in bankruptcy had seen fit to do so, he could have interposed mismanagement of the property as a defense to City National's claim without suing for the resulting damage and he then would have been pursuing his statutory duty under Section 47 (a) (8). But that is not what he saw fit to do. He was after a money judgment and pursued it in the upper courts after claim 9 and the fee petitions

had been disallowed below. In so doing, he was acting in behalf of the beneficiaries of the trust who would be benefited thereby had he been successful. Having lost, it is only just and equitable that the estate should bear the expense incurred. This is merely an instance of the correct application of well-established principles of law to the facts of the particular case and does not warrant the granting of a writ of certiorari.

V.

The Mandate Correctly Directed the Entry of a Judgment For the Full Amount Claimed.

The master recommended that the indenture Trustee's attorneys' fees be fixed at 35% of the requested allowance because the security holders had realized from the sale of the property only 35% of their capital investment. The master having already expressly found $15,000 to be reasonable for the services rendered, his recommendation represents a conclusion of law and not a finding of fact. We filed objections and exceptions and one of them was

> "That the Master erred as a matter of law in holding on page 10 of his report that although the requested attorney's fee of $15,000 for defense of the counterclaim is reasonable in amount, it should be reduced to 35% thereof if allowed because the holders of certificates of beneficial interest in the trust only realized 35% of their invested capital." (R. 243.)

This is one of the objections which was overruled by the trial court (R. 245). To that and other rulings we assigned error in our statement of points in the circuit court of appeals (R. 249). Consequently, the master's legal conclusion was properly before the circuit court of ap-

peals for review and has been correctly disposed of in that court's opinion.

Furthermore, the fact is that the property was never sold. A small group of security holders sold their securities at $35.00 a share to Fred Law, one of the parties to this proceeding below who owned all the other shares (R. 262).

The present claim of the City National is against the corporation. The certificate holders are in effect the owners of the corporation and of its property. For all practical purposes, they are the persons against whom the City National has its claim. We know of no legal or equitable principle which warrants reducing the amount of City National's claim merely because the certificate holders' interests have suffered a diminution in value, and the master offered none.

Even as against an original bondholder, who had paid par for his bonds, there is no legal or equitable principle which warrants reducing what the master has found to be a reasonable fee by 65% merely because the original bondholder's interest has suffered a diminution to that extent; but as against Law, who only paid 35% of the face value of the original securities, the finding even loses the premise on which it is predicated. We submit that the finding was clearly untenable and was properly reversed.

As we have heretofore shown, the master's finding that the expense items claimed were in fact incurred in defense of the counterclaim and that the requested attorneys' fee was reasonable is supported by the evidence and was not objected to or excepted to by petitioner. The circuit court of appeals, therefore, followed the accepted practice in directing the entry of judgment in the amount prayed for in City National's petition.

Conclusion.

In the original suit, which eventually reached this Court by writ of certiorari, the City National, the committee and their attorneys were denied all fees and expenses allowed to them by the state court foreclosure decree, as well as all fees and expenses in the 77B reorganization proceeding, except such out-of-pocket expenses of the committee as could be shown to have directly benefited the estate. This was not because the services were found to have been improperly or inefficiently performed but because this Court condemned, on the ground of conflicting interest, what was prior to that time the common practice of trustee banks of forming a bondholders committee from their own personnel to serve without compensation. As a result of that decision, the reorganized property has received the benefit of many hours of work of the indenture trustee, the committee and their attorneys gratis.

Due to petitioner's motion to dismiss the appeal from the disallowance of the committee's petition for out-of-pocket expense, which was filed in the district court after the mandate of this Court came down, the petitioner has even had the benefit of those expenditures without cost to it (R. 270-271).

Now the petitioner is seeking to evade payment of the costs necessarily incurred by the indenture trustee in defending against a groundless suit by which the trustee in bankruptcy sought to enrich the estate by some $300,000.00, on the theory that the Statutes of Gloucester and Marlborough made the indenture trustee liable thrice over for any damage resulting from its alleged mismanagement of the trust property.

This Court having found that "on this record recovery on the counterclaim would not be warranted," we respect-

fully submit that, under the applicable principle of law, the petitioner on whose behalf it was filed is liable for the costs incurred in defense; that the decision of the circuit court of appeals so holding in no way conflicts with the prior decision of this Court, and that the petition for certiorari should be denied.

Respectfully submitted,

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